

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2013 MSPB 19**

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Docket Nos. DE-0752-11-0337-I-1  
DE-4324-12-0123-I-1

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**James G. Evans,**

**Appellant,**

**v.**

**Department of Veterans Affairs,**

**Agency.**

March 1, 2013

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James R. Hefflin, Denver, Colorado, for the appellant.

Carl E. Stahl, Esquire, Steamboat Springs, Colorado, for the appellant.

Aleksander D. Radich, Esquire, Cheyenne, Wyoming, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman

Anne M. Wagner, Vice Chairman

Mark A. Robbins, Member

Vice Chairman Wagner issues a separate concurring opinion.

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of the initial decision that dismissed his involuntary disability retirement claim for lack of jurisdiction and denied corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at [38 U.S.C. §§ 4301-4333](#))

(USERRA).<sup>1</sup> For the following reasons, we VACATE the findings concerning the appellant's involuntary disability retirement claim, still DISMISSING that claim for lack of jurisdiction, and we AFFIRM the administrative judge's denial of corrective action under USERRA.

### BACKGROUND

¶2 The appellant, a Nurse with the Veterans Health Administration, filed an initial appeal on May 3, 2011, claiming that the agency forced him to take disability retirement on November 23, 2009, by providing misleading information concerning the amount of his disability retirement payments and by creating a hostile work environment. Initial Appeal File (IAF), Tab 1, Tab 16 at 3, 8. He asserted that the agency's actions were discriminatory and in retaliation for prior equal employment opportunity activity. IAF, Tab 1 at 2; IAF, Tab 16 at 1, 14-17. The appellant also made an assertion of discrimination under USERRA based on his military service. IAF, Tab 9 at 3. The administrative judge found that the appellant made a nonfrivolous allegation of involuntary disability retirement and held a hearing on the appellant's USERRA and involuntary disability retirement claims. IAF, Tab 26, Tab 45 at 2.

¶3 After a hearing, the administrative judge dismissed the appellant's involuntary disability retirement claim for lack of jurisdiction and denied corrective action under USERRA. IAF, Tab 50, Initial Decision (ID) at 2. She made the following findings: the appellant failed to establish by preponderant evidence that he was forced to retire due to misleading statements by the agency's human resources office; the appellant failed to establish by preponderant evidence that his disability retirement was coerced due to the

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<sup>1</sup> Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

agency's failure to accommodate his disabilities or due to a hostile work environment that caused or exacerbated the medical conditions underlying his disability retirement; and, in the absence of an appealable action, the Board lacked jurisdiction over the appellant's affirmative defenses, including his discrimination claim. ID at 6-10. In light of her jurisdictional findings, she did not make findings on the timeliness of the appellant's involuntary disability retirement appeal. ID at 1 n.2. She also noted that the Board may lack jurisdiction over the involuntary retirement appeal for another reason: the appellant appeared to be appointed as a Nurse with the Veterans Health Administration under [38 U.S.C. § 7401](#)(1), which is a position excepted from the competitive service and excluded from appeal rights to the Board by [5 U.S.C. § 7511](#)(b)(10). ID at 10 n.5. She denied on the merits the appellant's request for corrective action under USERRA because the appellant failed to establish by preponderant evidence that the agency's actions in allegedly coercing his retirement were influenced or motivated by his veteran status. ID at 11.

¶4 The appellant has filed a petition for review raising the following arguments: (1) the administrative judge was biased; (2) the administrative judge failed to adjudicate his appeal as a "mixed case"; (3) the agency "swindled" him out of employment; and (4) the agency did not challenge the Board's jurisdiction over his appeal. Petition for Review (PFR) File, Tab 1 at 1-2. He also argues that the Board should grant a stay pending a decision by the Supreme Court of the United States in *Kloeckner v. Solis*, [639 F.3d 834](#) (8th Cir. 2011), *cert. granted*, 132 S. Ct. 1088 (2012), which, he argues, will affect the mixed-case question in his appeal. PFR File, Tab 1 at 2. The agency has filed an opposition. PFR File, Tab 4.

### ANALYSIS

The Board lacks jurisdiction over the appellant's involuntary disability retirement appeal because the appellant is not an "employee" with chapter 75 appeal rights.

¶5 The Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal and may raise the issue of its own jurisdiction sua sponte at any time. *See Schmittling v. Department of the Army*, [219 F.3d 1332](#), 1337 (Fed. Cir. 2000); *Metzenbaum v. General Services Administration*, [96 M.S.P.R. 104](#), ¶ 15 (2004). As the administrative judge noted, the Board may lack jurisdiction over the appellant's involuntary disability retirement appeal because he appeared to be appointed under [38 U.S.C. § 7401](#)(1) and, therefore, was not an "employee" for the purposes of 5 U.S.C. chapter 75 appeal rights. ID at 10 n.5; IAF, Tab 12, Subtab 4g; *see* [5 U.S.C. § 7511](#)(b)(10). Because the parties did not have an opportunity to brief this potentially dispositive jurisdictional issue below, the Clerk of the Board issued a Show Cause Order ordering the parties to submit argument and evidence concerning whether chapter 75 appeal rights apply to the appellant. PFR File, Tab 5. The agency responded by asserting that the appellant was appointed under [38 U.S.C. § 7401](#)(1) and was not an "employee" entitled to appeal to the Board. PFR File, Tab 6 at 4. It also attached the appellant's SF-50 reflecting that he was appointed under [38 U.S.C. § 7401](#)(1). *Id.* at 5. The appellant did not respond to the Show Cause Order, and the record closed on December 6, 2012. PFR File, Tab 5.

¶6 Generally, positions that are excluded from the competitive service under a provision of Title 38 are excluded from coverage under subchapter II of chapter 75. [5 U.S.C. § 7511](#)(b)(10); *see Khan v. United States*, [201 F.3d 1375](#), 1380-82 (Fed. Cir. 2000); *Davison v. Department of Veterans Affairs*, [115 M.S.P.R. 640](#), ¶¶ 7, 9 (2011). Thus, a Nurse appointed under [38 U.S.C. § 7401](#)(1) does not have the right to appeal chapter 75 adverse actions to the Board. *See Mfotchou v. Department of Veterans Affairs*, [113 M.S.P.R. 317](#), ¶¶ 8-11 (2010). The parties have had the opportunity to present argument and evidence on this issue, and it is

undisputed that the appellant was appointed under [38 U.S.C. § 7401](#)(1). For this reason, the Board lacks jurisdiction over the appellant's involuntary disability retirement appeal. Thus, we vacate the findings of the administrative judge concerning the appellant's involuntary disability retirement claim and dismiss that claim for lack of jurisdiction because the appellant is not an "employee" for purposes of chapter 75 appeal rights to the Board and cannot, therefore, appeal his involuntary disability retirement claim as an adverse action. *See Pariseau v. Department of the Air Force*, [113 M.S.P.R. 370](#), ¶ 11 (2010) (an involuntary retirement is equivalent to a forced removal under the Board's chapter 75 jurisdiction); *see also Mfotchou*, [113 M.S.P.R. 317](#), ¶ 11 (the appellant's exclusive remedy was before the agency because her position was excluded from the competitive service by or under a provision of title 38, which excluded her from chapter 75 coverage).

The appellant failed to demonstrate that his military status was a motivating or substantial factor in the agency's action.

¶7 In a USERRA action, there must be an initial showing by the employee, by preponderant evidence, that the employee's military status was at least a motivating or substantial factor in the agency action, upon which the agency must prove, also by preponderant evidence, that the action would have been taken for a valid reason despite the protected status. *Sheehan v. Department of the Navy*, [240 F.3d 1009](#), 1013 (Fed. Cir. 2001). The administrative judge found that the record was devoid of any evidence that the allegedly inaccurate guidance from the agency was influenced or motivated by the appellant's veteran status. ID at 11. We agree. We further find that, to the extent that the appellant intended to assert that the agency's actions that allegedly contributed to a hostile work environment were motivated by discrimination on the basis of his military status, the appellant also failed to submit argument or evidence sufficient to meet his burden of proof. Further, the appellant does not challenge the administrative

judge's USERRA findings on review. Thus, we affirm the administrative judge's denial of corrective action under USERRA.

The appellant's remaining arguments on review are unavailing.

¶8 The appellant alleges that "[t]he judge in this matter was biased" and "has a published statistical record from the MSPB of rarely ruling in favor of appellants." PFR File, Tab 1 at 1. The appellant has not, however, submitted any argument or evidence to overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *See Smets v. Department of the Navy*, [117 M.S.P.R. 164](#), ¶ 15 (2011), *aff'd*, No. 2012-3047, 2012 U.S. App. LEXIS 23332 (Fed. Cir. Nov. 4, 2012) ; *see also Eldeco, Inc. v. National Labor Relations Board*, [132 F.3d 1007](#), 1010 (4th Cir. 1997) (discounting statistical arguments as irrelevant and uninformative).

¶9 The appellant requests that the Board stay his appeal pending the Supreme Court decision in *Kloeckner*, [639 F.3d 834](#), "which is expected to decide if mixed case appeals can proceed directly to U.S. District Court."<sup>2</sup> PFR File, Tab 1 at 2. When an individual alleges that a personnel action, which can be appealed to the Board, was taken against him because of discrimination, the dispute is referred to as a "mixed case appeal." *Cunningham v. Department of the Army*, [2013 MSPB 7](#), ¶ 9; *see 29 C.F.R. § 1614.302*(a)(2). The Supreme Court decided *Kloeckner* on December 10, 2012, and ruled that, under [5 U.S.C. §§ 7702](#) and 7703(b)(2), an individual who receives a final Board decision in a mixed case may seek review in federal district court, regardless of whether the Board addresses the substance of the discrimination claim(s). *Kloeckner v. Solis*, [133 S. Ct. 596](#), 607 (2012). *Kloeckner*, however, concerned a Board appeal that was dismissed as untimely. The Board recently issued *Cunningham*, which concerned a Board appeal that was

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<sup>2</sup> In *Kloeckner*, the U.S. Court of Appeals for the Eighth Circuit ruled that the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over an appeal in which the Board does not reach the merits of a discrimination claim. 639 F.3d at 838.

dismissed for lack of jurisdiction, to explain how *Kloeckner* affects the Board's practice of providing appellants with notice of their review rights in final Board decisions. [2013 MSPB 7](#), ¶¶ 1, 14. As stated in *Cunningham*, the Board shall provide notice of mixed-case appeal rights in all cases in which the appellant was affected by an action that he may appeal to the Board and alleges prohibited discrimination, regardless of whether the Board decides the claim of discrimination. *Id.*, ¶ 14. In *Cunningham*, the Board did not provide notice of mixed-case appeal rights to the probationary employee because she did not have a right to appeal her termination to the Board. *Id.*

¶10 As fully explained above, the appellant does not satisfy the definition of "employee" and does not have the right to appeal his involuntary disability retirement claim to the Board. Thus, we are not providing notice of mixed-case appeal rights because the appellant was not affected by an action that he may appeal to the Board. *See id.*

#### ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec.

27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms](#) 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.



CONCURRING OPINION OF ANNE M. WAGNER

in

*James G. Evans v. Department of Veterans Affairs*

MSPB Docket Nos. DE-0752-11-0337-I-1, DE-4324-12-0123-I-1

¶1 While I concur with the Board's decision to affirm the dismissal of this appeal for lack of Board jurisdiction, I believe, as expressed more fully in my separate opinion in *Cunningham v. Department of the Army*, [2013 MSPB 7](#), that the best course of action would be to notify appellants who have alleged discrimination and whose appeals are dismissed for lack of jurisdiction that, in light of *Kloeckner v. Solis*, [133 S. Ct. 596](#) (2012), they may also have a right to judicial review in district court.

¶2 In *Cunningham*, a majority of the Board found that the Supreme Court's recent decision in *Kloeckner* does not require that it provide notice to the appellant of the opportunity to file a civil action against the agency raising her discrimination and other claims in an appropriate U.S. district court when an appeal is dismissed for lack of Board jurisdiction. Although the courts may ultimately uphold this determination, I think that, pending further clarification of *Kloeckner* from the courts, the Board should notify appellants who have alleged discrimination that they may have a right to judicial review in district court. *Cunningham*, [2013 MSPB 7](#), ¶ 4 (Vice Chairman Wagner, Separate Opinion).

¶3 Furthermore, it should be noted that the Federal Circuit heard oral argument on January 10, 2013, regarding whether it has jurisdiction to decide an appeal of an involuntary retirement dismissed by the Board for lack of jurisdiction in which the appellant alleged her retirement was coerced by the agency's age and gender discrimination, harassment, and reprisal of prior protected Equal Employment Opportunity activity. *Conforto v. Merit Systems Protection Board*,

No. 2012-3119 (Fed. Cir. filed Apr. 23, 2012). Thus, our reviewing court may provide some instruction on this issue in this appeal.

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Anne M. Wagner  
Vice Chairman